OCT 15 1920
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 376.

JOHN E. KINNANE, United States Attorney for the Eastern District of Michigan,

Appellant,

against

DETROIT CREAMERY COMPANY, et al.,

Appellees.

Appeal from the District Court of the United States for the Eastern District of Michigan.

BRIEF FOR APPELLEES.

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John E. Kinnane, United States Attorney for the Eastern District of Michigan,
Appellant,

vs.

Detroit Creamery Company, *et al.*,
Appellees.

Appeal From the District Court of the United States for the Eastern District of Michigan.

BRIEF FOR APPELLEES.

Statement of the Case.

This is an appeal from a decree of the United States District Court for the Eastern District of Michigan which enjoined the appellant, the United

States Attorney for that district, from prosecuting the appellees, or any of them, under certain provisions of Section 4 of the Lever Act, so-called, as amended, being the Act of Congress of August 10, 1917, (40 Stat., 276), as amended by the Act of Congress approved October 22, 1919, (41 Stat. 297). (Transcript, pp. 30-32).

A proper statement of this case is made in the opinion of the District Judge, which reads in part as follows:

> "The sole question involved in this case is whether the provision of section four of the food control act, also known as the Lever Act, being the act of Congress of August 10, 1917, chapter 53, 40 Statutes at Large, 276, as amended by section two of the act of October 22, 1919, making it unlawful for any person, among other things, 'to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries' is constitutional.
>
> "Plaintiffs filed their bill of complaint herein, alleging that they were engaged in the business of purchasing milk from producers thereof and preparing the same for the market and for resale distribution to the consumers thereof within the City of Detroit and adjacent territory; that the price of milk for the past several years in Detroit has been established between the producer and the distributor by the Detroit Milk Commission, 'a body composed of men who, by reason of continuing investigation and contact with the conditions properly entering into a reasonable price for the retail and wholesale sale of milk, have become practical experts;' that under the price schedule fixed from time to time by said commission the rights of the said producers and distributors on the one hand and of the public on the other had been properly protected and that the price of milk per

quart for sale at retail to the public had been prescribed for the month of March, 1920, at sixteen cents per quart, based on a certain price to the producers as set forth in the bill; that the defendants other than John E. Kinnane (the latter being United States attorney for this district) claimed that they composed a body designated as a 'Federal fair price commission,' appointed under authority of the so-called Lever Act hereinbefore mentioned, and as such had attempted to prescribe a schedule for the sale of milk at retail to commence April 15, 1920, at fourteen cents per quart; that said defendants did not hold any legal office, and that their action in attempting to prescribe such rate was void and of no effect; that the defendant, Kinnane, was the United States district attorney, as aforesaid, and as such had stated publicly that he would cause to be prosecuted any person failing to comply with the price schedule so prescribed by the so-called fair price commission mentioned, as a violation of the said Lever Act; that plaintiffs had in their employ upwards of five hundred milk salesmen selling their milk at retail to householders and consumers daily and that the fines capable of being levied or claimed rightfully to be levied on one day's transactions against such salesmen would aggregate millions of dollars; that plaintiffs had in their retail milk business large numbers of vehicles of various kinds, representing many thousands of dollars; that by reason of the aforesaid threats of the defendants against plaintiffs, said milk salesmen would not continue to deliver milk at lawful prices and as a result of the claimed and usurped authority of the defendants, unless restrained, the business of the plaintiffs would be irreparably injured and destroyed; that in so far as said act undertook to make it unlawful for any person 'to make any unjust or unreasonable rate or charge in handling or

dealing in or with any necessaries' it did not legally create any crime under the United States constitution, particularly the sixth amendment thereto, for the reason that such alleged crime was expressed in such vague, indefinite, and uncertain manner, without any reasonably certain standard, as to be a violation of the rights of citizens of the United States, such as the plaintiffs; that the threatened criminal prosecution referred to would involve the plaintiffs in contractual difficulties and litigation over existing contracts for the supplying of milk to them, would result in the destruction of their established business and would operate to deprive the plaintiffs of their property without due process of law, in violation of said constitution and that they were entitled to come into this court to enforce their Federal rights thus threatened; that the defendants were claiming to act under order of the said Lever Act, but as such act is void it affords them no justification and renders them liable to be enjoined from inflicting upon plaintiffs the wrongs complained of, and that the plaintiffs had no adequate remedy at law and this court had sole jurisdiction of the subject matter of their grievance; that the said defendants other than the said Kinnane acted capriciously and without affording the plaintiffs any real opportunity to be heard and without any proper examination or investigation into the facts, and that the price fixed by such so-called Federal fair price commission was confiscatory and illegal. Plaintiffs further challenge the constitutionality of said Lever Act on the grounds that it was vague, indefinite and uncertain; that it fixed no immutable standard of guilt but left such standard to the variance of the different courts and juries which might be called upon to enforce it; that it did not inform those accused of its violation of the nature of the accusation against them nor as to what acts

would constitute such violation; that it failed to define a crime, but in essence merely declared that any person who should commit any unjust or unreasonable act should be guilty of a felony; and that if enforced it would deprive citizens of the United States of their property and liberty without due or any process of law. Plaintiffs prayed that the defendants be enjoined temporarily and permanently from attempting to enforce the schedule of rates complained of, from interfering with the free conduct of their business by commencement of criminal proceedings or otherwise, and from harrassing or oppressing them in the premises. The bill concluded with a prayer for general relief.

"An answer was filed by the district attorney in which he alleged that he and the other defendants constituted a body designated as the Federal fair price committee, having been legally so appointed by the Attorney General of the United States; that as district attorney he approved of the judgment of said committee in its aforesaid action; that he had not made any statement or reached any determination as to any method of procedure against the plaintiffs for selling milk at excessive prices, but that it was probable that prosecution would be based on the provisions of said Lever Act providing punishment for monopolizing or attempting to monopolize the milk supply of the City of Detroit or for conspiring to limit the facilities for supplying milk to said city, or to restrict said supply or the distribution thereof in order to enhance the price thereof; that the arrangements under which the producers and distributers, including the plaintiffs, supplied milk to said city deprived the latter, in an arbitrary and unreasonable manner, of its natural supply thereof and restricted the free sale of milk to the people of said city; that the plaintiffs were making huge profits in handling and distributing milk in

said city and that a number of them had paid stock dividends and large cash dividends derived from the very large margin which they made per quart for distributing said milk; that the retail charge made by plaintiff for delivering milk to consumers was excessive and unreasonable and that a reduction in such price if borne entirely by the distributers of milk, including the plaintiffs, would not unfairly reduce their profits or injure their business; that the said Lever Act as amended was not unconstitutional as charged in the bill; that compliance with the prices fixed by said fair price committee would not involve the plaintiffs in litigation over existing contracts for supplying milk; that such prices were not confiscatory or unfair and would not cause irreparable injury to plaintiffs; that such prices were not fixed capriciously, but after a full hearing to the milk producers and distributors; that no ground exists for an injunction against him as United States attorney, as his right to act in his official capacity in accordance with his judgment can not properly be restrained by this court, but that any question arising under the law involved can be readily tested by proper action in proceedings brought for the enforcement thereof and that the relief prayed should be denied and the bill of complaint dismissed.

"An intervening petition was filed by the Michigan Milk Producers' Association, alleging that it was composed principally of farmers and dairymen throughout the State of Michigan who were engaged in the business of selling and delivering milk to the plaintiffs and that such association was under contracts with the plaintiffs for the sale of such milk, all of which was produced by the members of said association upon their farms to be distributed and sold within said City of Detroit and vicinity. Petitioner alleged that by virtue of said contracts it claimed an interest in this

suit and that as it would be vitally affected by the outcome of such suit it prayed for permission to intervene as a codefendant therein and to file a separate answer in order to protect its interests. In such answer as afterwards filed, said petitioner admitted the material allegations in the bill and practically joined with the plaintiffs seeking the same relief and on the same grounds prayed by them.

"On the hearing of the application for temporary injunction, the defendants, including the district attorney, conceded that the Federal fair price commission, also referred to as the Federal fair price committee, referred to in the pleadings, had no official standing or authority to fix rates or charges which were binding upon anyone, but was limited in its functions to informal investigations into conditions surrounding the making of prices for the commodities mentioned in the Lever Act and to advising, in an unofficial capacity, the district attorney in connection with such prices.

"On such hearing this court granted such applications as against the district attorney and issued such temporary injunction pending the final hearing on bill and answer, restraining said district attorney 'until the further order of the court, from enforcing or attempting to enforce any criminal proceedings against the plaintiffs or anyone of them for violation of section four of the Lever Act on the charge of making an unjust or unreasonable rate or charge in handling or dealing in or with any necessaries.' In view of the concession just mentioned in regard to the status of the other defendants, they were not made parties to said injunction.

"The parties hereto have now filed a stipulation setting forth that 'in view of the decision of the court in this cause on April 20, 1920, which granted a temporary restraining

order or injunction against the United States attorney for the Eastern District of Michigan, defendant herein, restraining him from prosecuting the complainants, or any of them, under a certain provision of Section 4 of the Lever Act, so-called, as amended; and holding and deciding that the provision of Section 4 of the aforesaid act of Congress, as amended, in so far as it declares it to be unlawful to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries, or to exact excessive prices for necessaries, is unconstitutional and void; and said decision being controlling and decisive in the case, and based entirely upon the law, it is therefore considered unnecessary to take proofs in this cause for the reasons aforesaid, the aforesaid question of law being controlling and decisive; it is therefore stipulated and agreed as aforesaid, that the case proceed to a final hearing without the taking of proofs, and that the taking of proofs herein be dispensed with." (Transcript, pp. 24-28).

ARGUMENT.

The fundamental questions relating to the constitutional validity of the statute have been so fully presented in the brief for the appellees in the case of *Harry B. Tedrow, as United States District Attorney, appellant,* v. *The A. T. Lewis & Son Dry Goods Company, et al.,* on appeal from the District Court of the United States for the District of Colorado (No. 357 of this Term), and the brief for the plaintiffs in error in the case of *Weed's, Inc., and Gurdon H. Smith* v. *United States,* in error to the District Court of the United

States for the Northern District of New York (No. 558 of this Term), that it is unnecessary to review the argument in this case.

We present the following points:

FIRST: The statute at the time of its enactment and attempted enforcement, was not a valid exercise of the war power. It was not competent for Congress on October 22, 1919, (when the amended statute was enacted), or at the times mentioned in the bill of complaint, to regulate the prices of retail sales in wholly intrastate transactions.

Our argument in support of this point is fully stated in the brief for plaintiffs in error in *Weed's, Inc., and Gurdon H. Smith* v. *United States*, No. 558, Point Second, pages 17-27, and in the brief for appellees in *Tedrow* v. *The A. T. Lewis & Son Dry Goods Company, et al.*, No. 357, Points I and II, pages 19-103.

What is there said need not here be repeated, but is referred to and adopted in this case.

SECOND: The statute does not validly define a criminal offense and by reason of its uncertainty is invalid under the Fifth and Sixth Amendments to the Federal Constitution.

Our argument in support of this point is fully stated in the brief for appellees in *Tedrow* v. *The A. T. Lewis & Son Dry Goods Company, et al.*, No. 357, Points III, IV, VI, VIII, pages 103-148, 162-172, and 181-188; and in the brief for plaintiffs

in error in *Weed's Inc., and Gurdon H. Smith* v. *United States*, No. 558, Point Fifth, pages 54-68.

What is there said need not be here repeated, but is referred to and adopted in this case.

THIRD: The statute in question is arbitrary class legislation in violation of the Federal Constitution.

The argument in support of this point is fully stated in the brief for appellees in *Tedrow* v. *The A. T. Lewis & Son Dry Goods Company, et al.*, No. 357, Point V, pages 148-161, and in the brief for plaintiffs in error in *Weed's, Inc., and Gurdon H. Smith* v. *United States*, Point Sixth, pages 68-82.

What is there said need not here be repeated, but is referred to and adopted in this case.

FOURTH: The Court below had jurisdiction to enjoin the enforcement of the statute as threatened by the Appellant.

It is well settled that a Court of Equity has jurisdiction to enjoin the threatened enforcement of an unconstitutional statute, where it is shown, as it is in this case, that irreparable injury to property rights will result.

Davis v. *Los Angeles*, 189 U. S. 207, 218;
Dobbins v. *Los Angeles*, 195 U. S. 223, 241;
Ex parte Young, 209 U. S. 123, 159;
Philadelphia Company v. *Stimson*, 223 U. S. 605;
Truax v. *Raich*, 239 U. S. 33;
Hammer v. *Dagenhart*, 247 U. S. 251.

In the case of *Ruppert* v. *Caffey*, 251 U. S. 264, while there was a division in this court, the majority suggested no difficulty as to the jurisdiction of equity and four of the justices were in favor of sustaining the appeal upon its merits.

As the appellant, until restrained by injunction, was proceeding under a construction of the statute, which, as we view it, would make it clearly unconstitutional, this case is brought directly within the rule of those above cited.

The question is not of injury to good name and reputation through a threatened indictment. It goes far deeper than that. As Mr. Justice Holmes said in *International Harvester Company* v. *Kentucky*, 234 U. S. 216, 223: "If business is to go on, men must * * * sell their wares." To compel them to guess with respect to what they may properly charge for their wares under threatened indictment is to put business under a ban and invade property rights.

We may supplement the above summary statement of our points by quoting the opinion of the District Judge in this case. After the statement of the case, above quoted, the opinion proceeds as follows:

> "The only question, therefore, now involved is whether the provisions of section four of this Lever Act as amended to the effect that 'it is hereby made unlawful for any person * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' is constitutional.
>
> "The sixth amendment to the Federal Constitution provides that 'in all criminal prosecutions the accused shall enjoy the right * * *

to be informed of the nature and cause of the accusation.' It seems clear that an indictment which, following the language of this statute, charged a person with merely having made an 'unjust' or 'unreasonable' rate or charge in handling or dealing in or with any necessaries would be wholly insufficient to inform such person of the nature and cause of the accusation thus made.

"Such an indictment, however, could not specify the offense thus charged with any more detail for the reason that the statute purporting to create such offense does not state the facts, acts or conduct necessary to constitute the crime denounced. What is an unjust rate or an unreasonable charge? In determining this question, what elements are to be taken into consideration? What is the test or standard or basis which is to be used in attempting to ascertain whether this statute has been violated? The statute itself furnishes no assistance in the way of answering this question. Is the reasonableness or justice of a rate to be determined by the amount of profit derived therefrom? If so, what percentage of profit from the business of selling a certain article makes the rate or charge in handling or dealing in that article unreasonable and therefore unlawful and criminal? If such profit is derived from a business devoted to the sale of several kinds of articles, how is the portion of such profit properly chargeable to each of such articles to be determined so that the person engaging in such business may know whether or not he is a criminal? What elements enter into the question whether any particular charge is just or unjust, reasonable or unreasonable? What relation to the reasonableness of a rate have the cost of labor, the cost of machinery and of raw material, the cost of overhead charges, and the other expenses of production? How is the amount properly chargeable to these

expenses to be fixed and ascertained? To what extent are differences in market conditions in different places to be considered? Is the existence or absence of competition to be taken into account? Is any allowance to be made for losses and misfortunes which affect costs and profits? To whom must a rate or charge be unjust, to be 'unjust' within the meaning of this statute? Is it the effect which a rate or charge has upon the seller or which it has on the purchaser which renders it reasonable or unreasonable? These and other questions which readily suggest themselves naturally and perhaps necessarily enter into a consideration of the nature of the proper test or standard by which the criminality of any act under this statute must be determined. To the statute itself we look in vain for answers to any of such questions. It furnishes no means for the guidance of courts, juries, or defendants in determining when or how the statute has been violated. No standard or test of guilt has been fixed. We are left to the uncontrolled and necessarily conjectural judgment, or rather conclusion, of each particular jury, or perhaps, court, before which the accused in any given case may be on trial for his liberty. Making, as it does, the question of guilt dependent upon this mere conclusion, or opinion, of the court or jury as to whether the rate or charge involved be just or unjust, reasonable or unreasonable, I cannot avoid the conclusion that this statute is too vague, indefinite, and uncertain to satisfy constitutional requirements or to constitute due process of law. *United States* v. *Brewer*, 139 U. S. 278, 35 L. Ed. 190; *Louisville & Nashville R. R. Co.* v. *Railroad Commission of Tennessee*, 19 Fed. 679; *Tozer* v. *United States*, 52 Fed. 917; *Hocking Valley Ry. Co.* v. *United States*, 210 Fed. 735; *United States* v. *L. Cohen Grocer Co.* (recent unreported decision of the United States Dis-

trict Court for Eastern District of Missouri); *United States* v. *Capital Traction Company*, 34 App. D. C. 592; *Louisville & Nashville R. R. Co.* v. *Commonwealth*, 99 Ky. 132, 35 S. W. 129.

"It is, of course, extremely unfortunate that in enacting this statute Congress should have neglected to observe the constitutional guaranties applicable, but this court can not amend the statute, either by judicial construction or otherwise, but can only interpret and apply it in accordance with rules of law. Any argument based upon what may be thought to be the practical effect of proper judicial construction must be addressed to the only tribunal which made or can make this statute or any other statute deemed by it necessary to carry out the purposes for which it passed this unconstitutional law. There can be no doubt of the power of this court to enjoin the defendant, although occupying the official position which he does, from attempting to enforce an unconstitutional criminal statute against the plaintiffs, in excess of his lawful authority and to their threatened and resultant irreparable injury, as alleged in the bill of complaint herein. *Philadelphia Co.* vs. *Stimson*, 223 U. S. 605, 56 L. Ed. 570; *William Cramp & Sons Ship & Engine Building Co.* vs. *International Curtis Marine Turbine Co.*, 246 U. S. 28, 62 L. Ed. 560.

"The commencement of various criminal prosecutions based upon alleged violation of the statutory provision here involved clearly indicates the intention of the defendant district attorney to attempt the enforcement of this particular provision of the statute, and shows beyond doubt the propriety and necessity of the injunction sought. Plaintiffs, however, are not required to wait until criminal prosecutions are actually brought against them, before invoking the equitable relief to

which they are entitled under the circumstances. *Vicksburg Water Works Co.* vs. *Vicksburg*, 185 U. S. 65, 46 L. Ed. 808; *Waite* vs. *Macy*, 246 U. S. 606, 62 L. Ed. 892.

"In view of some of the allegations in the answer, it may not be amiss to make it entirely plain, if it is not already, that the only portion of this statute involved, construed, or considered here is the provision therein prohibiting the making of an 'unjust or unreasonable rate or charge in handling or dealing in or with necessaries.' No opinion is expressed concerning the meaning, scope, or effect of any other portions of such statute.

"A decree will be entered making the temporary injunction permanent against the defendant Kinnane and dismissing the bill as to the other defendants" (Transcript, pp. 28-30).

We respectfully submit that the reasoning of the learned District Judge above quoted is correct.

We also call the attention of the Court to the opinion of District Judge Thompson for the Eastern District of Pennsylvania in *Lambors* vs. *McAvoy*, 265 Fed. 944. In this opinion Judge Thompson quotes from the opinion of this Court in *Nash* vs. *United States*, 229 U. S. 376, written by Mr. Justice Holmes, (which it was contended is an authority for the proposition that the portion of the Lever Act under discussion is constitutional), and then he says:

"I do not construe the language of Mr. Justice Holmes to mean that a crime may be predicated alone upon the reasonableness or unreasonableness of a man's conduct as found by a jury, but that, where a criminal statute deals with an offense known to the common law, such as monopoly, restraint of trade, and

kindred offenses, or, for example, those based upon common law offenses based upon causing the death of another, or, broadly speaking, any common law offense taken up by a statute, then, where questions of degree must be determined to establish criminality, the fact that they must necessarily be determined by a jury does not render the statute unconstitutional and void.

"The present statute, however, leaves it open to the jury to determine whether it is unreasonable or unjust to make the rate or charge for necessaries, depending upon any number of undefined circumstances which may enter into the transaction. It leaves it uncertain, for instance, whether a man may lawfully base the price of his commodity upon a profit over the original price he paid for the identical article sold, whether he may lawfully make a price based upon general market conditions, whether he may make a profit based upon the average cost of a number of similar purchases, whether his selling price may be based upon the cost he would have to incur to replace the merchandise, and in general the jury may speculate as to any line of conduct, whether it would or would not justify a rate or charge, in determining whether it was unjust or unreasonable."

We also call attention to *United States* vs. *Armstrong*, 265 Fed. 683, a decision made by District Judge Anderson of Indiana, in which he held that Section 4 of the Lever Act was unconstitutional because of the provision therein making the section inapplicable to farmers and others; as an arbitrary and unconstitutional classification under

the case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

The decree below should be affirmed.

Respectfully submitted,
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